

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 62 OF 2005

Francis Xavier Salemao,
s/o David Salemao,
aged 40 years,
r/o H. No.395,
Porshiro,
Bogmalo, Goa.

... Appellant

versus

State through the Public
Prosecutor.

... Respondent

Mr. S. G. Bhobe, Advocate for the Appellant.

Mr. C. A. Ferreira, Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 15TH FEBRUARY, 2007.

ORAL JUDGMENT

This appeal is by the accused who has been convicted
and sentenced under Section 9-B(1)(b) of the Explosives Act,

1884(Act, for short) for having been found in possession of 9 non electrical detonators and 31 electrical detonators(item nos.25 to 28), 26 percussion caps(item nos.20 and 24) of panchanama Exh.C-12 which are explosives as defined under Section 4(d) of the Act.

2. The accused was charged and tried under Sections 3, 5 r/w Section 25 of the Arms Act, 1959 and Section 5 of the Explosive Substances Act, 1908 in addition to Section 9-B(1)(a) and (b) of the Explosive Act, 1884, with the allegation that at 13.00 hours on 14-1-2001, PSI Banudas Dessai/PW14 who at the relevant time was attached to Vasco Police Station had received reliable information that the accused was in possession of illegal fire arms and consequent to the said information the house of the accused was raided and the accused was found with a rifle, revolver, live cartridges, empty cartridges, bullet heads, detonators, percussion caps, etc., list of which can be seen from the complaint filed by the said PSI Dessai/PW14 and produced as Exh.C-45.

3. To support the charge against the accused, prosecution examined 14 witnesses out of which, two witnesses were declared hostile and cross-examined by the prosecution but without any benefit to its case. Upon considering the evidence produced, the learned Additional Sessions Judge, acquitted the accused under Sections 3, 5 r/w 25 of the Arms Act, 1959 on the ground that the sanction for prosecution was given without application of mind and this the learned Additional Sessions Judge held inspite of the fact that the sanctioning authority was examined by the prosecution to prove the sanction given. The learned Additional Sessions Judge acquitted the accused under Section 7 of the Explosive Substances Act, 1908 as there was no valid consent given by the Central Government as required under Section 7 of the said Explosive Substances Act, 1908. The prosecution had chosen not to contest the acquittal of the accused under Sections 3, 5 r/w 25 of the Arms Act, Section 5 of the Explosive Substances Act, 1905 and Section 9-B(1)(a) of the Explosive Act, 1884.

4. The raid was conducted by PSI Dessai/PW14 in the presence of the panch witness Franky Fernandes/PW2, Dy.S.P. Borkar/PW12, Police Inspector Govekar/PW10 and Head Constables Gaokar/PW6 and Ghadi/PW8. As far as the detonators and percussion caps are concerned, they were sent for expert analysis to the Deputy Controller of Explosives and the Forensic Science Laboratory, respectively. The Deputy Chief Controller Shri Kalambhe/PW4 opined that the ordinary detonators were live and were explosives of class 6, division 3 as defined in Schedule-I of the Explosives Rules, 1983 and the electric detonators were explosives of class 6, division 3 of the said Schedule of the said rules of 1983, the possession, the use and the sale of which was prohibited without a license. As regards the percussion caps, the Senior Scientific Officer of CFSL Shri Kamila/PW5 opined that the percussion caps(primers) were the components of 12 bore shot gun cartridge and were company manufactured.

5. As per the version given by PSI Dessai/PW14, on 14-1-2001, when he was at the Police Station at about 13.00 hours he received information from reliable sources that one

Francis Salemao alias Pampush of Porshiro, Bogmalo, Vasco da Gama was in illegal possession of fire arms and that there was every possibility that he might dispose of the same and therefore he secured the presence of panchas, namely, Franky Fernandes/PW2 and Francis D'Souza; He along with Dy. S. P. Shri Vishram Borkar left to Porshiro, Bogmalo in a Police jeep and a kit box, leaving a message at the Police Station to send more staff and upon reaching at Porshiro, Bogmalo, they located the house of Francis Salemao alias Pampush. According to him, there was one person standing in the veranda of the said house and on being asked he gave his name as Francis Xavier Salemao alias Pampush, son of David Salemao, resident of House No.395, Porshiro, Bogmalo, and, they explained the purpose of their visit to him and also offered their search which the accused declined and allowed to search his house. As per him, in the said house, there was a room on the right side which was latched. The accused opened the said room and inside the said room there were two racks which contained spanners, screw drivers, oil tins, zinc trunk and a Reebok hand bag of black colour and below the said bag a rifle of 12 bore was found. PSI Dessai/PW14 has given further details of the other articles

found including the detonators and percussion caps and further stated that the accused could not produce any valid document or license, on being asked about the same. PSI Dessai/PW14 then stated that he secured the presence of a photographer and then he placed the articles found on the tepoy and photographs of the same were taken and thereafter the said articles were seized. Franky Fernandes/PW2 has stated that he acted as a panch witness in this case and that 14-1-2001 was a Sunday. He stated that at about 12.30 p.m. when he was at his residence he was called to act as a panch. He also stated that PSI Dessai/PW14 had informed him about the purpose of conducting the panchanama of illegal possession of fire arms by Salemao who is also known as Pampus, resident of Bogmalo and thereafter he along with PSI Dessai, the other panchas and Police staff visited the house of the said Salemao. According to him, the accused was present in the said house to whom PSI Dessai/PW14 explained the purpose of visit to his house, which according to him, bore House No.395. As per him, PSI Dessai/PW14 informed the accused that he was free to take the search but the accused declined to take any search. He stated that there is a veranda to the said house which faces south and there was a room on the

right hand side of the house which was latched and closed and which the accused himself opened. In cross-examination, he admitted that the room was opened by the accused on being asked by the Police to open the same. He stated that he knew that the accused was a mechanic, and that the panchanama started at about 1.20 p.m. and concluded at about 5.10 p.m.

6. As already stated, two of the witnesses examined by the prosecution turned hostile to its case and did not support it. Presumably, Sebastiao Pereira/PW1 was examined by the prosecution to show that he had taken one Viraj to the house of the accused and from whom the said Viraj had purchased a revolver worth Rs.30,000/-. Anthony Rodrigues/PW3 was examined to show that the accused was carrying out the repairs of fire arms but he too did not support the case of the prosecution. Prosecution also did not examine one Zacarias Rodrigues and Gajanan Kharangate and presumably because they were unavailable to be examined. PSI Dessai/PW14 was examined before the trial Court on 6-12-2004 but his examination was discontinued as he was unwell on that date and his examination resumed on 17-1-2005. In between, it appears

that prosecution/PSI Dessai found that there was no reliable and convincing evidence to connect the accused with possession of the said explosives, found in the room to the right of the said house and therefore on 13-12-2004 a written request was made to the Mamlatdar. It is seen from the said letter dated 13-12-2004 which PSI Dessai produced as Exh. C-50 that during the trial the defence Advocate had mentioned that on the day of the Police raid, the house did not belong to the accused and he was not staying in the said house and in order to prove that the accused was staying in the said house he was in need of the documents mentioned therein, namely, (1) residential proof that the accused Francis Xavier Salemao, son of David Salemao was staying in House No.395, Porshiro, Bogmalo, (2) name of the accused on the ration card, (3) Electoral Roll and (4) any other document. By letter dated 17-12-2004, the Mamlatdar, Vasco da Gama produced a declaration, presumably filed with a view to obtain the ration card, on which the name Francis Salemao is mentioned along with his son Elies Salemao and daughter Charlet Salemao aged 9 and 8 years respectively against House No. 395/1. One does not know who had signed the said declaration. Prosecution took no steps to produce any evidence

to prove that the said declaration was indeed given by the accused. There is no explanation from the prosecution as to how house number 395 is shown as H.No.395/1 if the new number of the house is 45, as stated in the said letter dated 17-12-2004. Therefore, it is difficult to say that it pertains to the house of the accused bearing no.395. The electoral roll shows that in House No.395, Salemao Matilda David, the mother of the accused, Salemao Francis David, the accused, Salemao Santan Francis, wife of the accused and Salemao Shila David, the sister of the accused were residing in the relevant year. When PSI Dessai/PW14 was cross-examined, he stated that he asked regarding the possession of the house, with the accused who had informed him that the said house is in the name of his mother, Smt. Matilda Salemao. One does not know at what stage the accused had given the said information. As per letter dated 17-12-2004 of the Mamlatdar(Exh. C-51 colly), House No.395 (old) bears No.45(new) and the same is registered in the name of the mother of the accused Smt. Matilda Salemao. Although, the Mamlatdar has not produced any record to substantiate the said statement in the said letter dated 17-12-2004, it is the very case of PSI Dessai/PW14 now that the said house belongs to the

mother of the accused, Matilda Salemao and not to the accused. Having realized that the house No.395 stood in the name of the mother of the accused, as per information, given to him by the Mamlatdar, which information he ought to have verified before filing the charge sheet, PSI Dessai/PW14 made another statement that the accused was in possession of the room when the raid was conducted.

7. From the evidence of PSI Dessai/PW14, the panch witness Franky Fernandes/PW2, the constables/PW6 and PW8, it can be safely held as proved that when the raiding party went to House No.395 at Porshiro, Bogmalo, the accused was found in the veranda of the said house. It has been submitted on behalf of the accused, that Franky Fernandes/PW2 mentioned the time when he was called as 12.30 p.m and that could not be the case in case PSI Dessai/PW14 had received the information at 1 p.m. It is also pointed out that Franky Fernandes/PW2 was a Reporter who used to visit the Police Station frequently and therefore was bound to support the case set out by PSI Dessai/PW14. Franky Fernandes/PW2, as stated by him was at the relevant time serving at Mormugao Port Trust and it appears that he was a

part time Journalist and in connection with his work as a Journalist was frequently visiting various Police Stations including the Vasco Police Station. The timing given by him as 12.30, being the time he was called by PSI Banudas Dessai cannot be given much importance, considering the facts of the case. The learned trial Court has considered the discrepancy as trivial as it could not be expected of him to have given the correct timing when his assistance was sought. In my view his evidence appears to be reliable and convincing and there is nothing in his evidence even to remotely suggest that he was obliged to depose falsely in favour of PSI Dessai/PW14. Although, PSI Dessai/PW14 has stated that the accused stated that the said arms and ammunitions belonged to him, this is a statement which was not made by PSI Dessai/PW14 on 6-12-2004 when he was examined for the first time but subsequently made on 17-1-2005. The said statement has also not been supported by Franky Fernandes/PW2 who was present at the time of the raid and in case the accused had stated to PSI Dessai//PW14 that the arms and ammunitions to the said house belonged to the accused, then Franky Fernandes/PW2 would have certainly continued the said statement. That

statement of PSI Dessai/PW14 has got to be considered as an improvement.

8. From the facts stated by PSI Dessai/PW14 and Franky Fernandes/PW2 and other witnesses particularly constables/PW6 and PW8 is that the accused was present in the open veranda at the time when the Police raided the house/room which now admittedly belongs to the mother of the accused as it stands recorded in her name. From the said evidence, it transpires that the accused was present in the veranda of the said house, was directed by PSI Dessai/PW14 to open the latch of the said room to the right which the accused opened and then the racks, the trunk, the bag, etc. were noticed in the said room and of which photographs were subsequently taken. The learned Additional Sessions Judge has convicted the accused that because the accused opened the room on the right hand side, this fact established that the accused was in possession of the said room. This can be seen from paras 20 and 23 of the learned Judgment. The learned Additional Sessions Judge also observed, and, in my view wrongly, that not even suggestions were thrown in the cross-examination that the accused did not open the said

room. The accused had already taken a plea that the said house did not belong to him and that had made the prosecution fittery compelling the prosecution to write to the Mamlatdar in search of further evidence to prove the possession of the house with the accused. It is quite possible that instead of the accused having been found in the open veranda of the said house, the mother of the accused Matilda Salemao or his wife Santana Salemao might have been found there and if directed they too would have opened the room but I do not think that on that basis the prosecution would have prosecuted any of them. The question is whether on the basis that the said room was opened by the accused could it be said that the accused was alone in exclusive possession of the said room or conscious possession of the said arms and ammunitions found in the said room?

9. The learned Public Prosecutor contends that the said room had only one door leading to the veranda and from that it could be presumed that the accused was in exclusive possession of the said room and consequently the arms, ammunitions and other explosives found therein. However, I must simply add that that was not the case of the prosecution at any time that the

house belonged to the mother of the accused while the accused was in exclusive possession of the said room and therefore in possession of the said articles. In fact, PSI Dessai/PW14 did not even prepare a sketch either of the said room or the said room in relation to the house to find out whether it was otherwise inaccessible from inside the house. As per Constable Gaonkar/PW6 they had verified during the raid that the accused, his wife and two children were residing in the said house but on further cross-examination he conceded that the said statement was not reflected in the panchanama nor the statement of the wife of the accused or his children were recorded.

10. The learned Counsel on behalf of the accused contends that the conviction has been based in the absence of legal evidence either to show that the house belonged to the accused or that the same was in exclusive possession of the accused. The learned Counsel has placed reliance on **Ismailkhan Aiyubkhan Pathan v. State of Gujarat**(2002 Drugs Cases 56). This was a case where six accused were found in the room which was raided with prior information that drugs were being sold in the said room and the Apex Court observed as follows:-

"There is no evidence that anybody had seen that any of the accused was dealing with narcotic drugs. There is also no evidence to show that anyone of them had admitted either through a confession or otherwise of any incriminating role. Nor is there evidence that the accused persons, who were found sitting in the room, had possession of the room, actual or constructive. It is the prosecution case that the said room was in the possession of Nasir. But that Nasir is not an accused in this case. He was not examined as a prosecution witness to disclose as to how the accused persons happened to be in the room. None of the neighbours supported the prosecution case that anyone of the accused had a connection with the article in question".

11. As already observed, the learned Additional Sessions Judge came to the conclusion that the accused was in exclusive and conscious possession of the said articles i.e. arms, ammunitions, etc. because he opened the latch of the door when directed to do so by the raiding party. Possession is a polymorphous term. In **Gunwantlal v. The State of Madhya**

Pradesh(AIR 1972 SC 1756) the Apex Court with reference to Section (1)(a) of Arms Act, 1959 has stated that possession of a firearm must have an element of consciousness or knowledge of that possession and where he is not in actual physical possession, he has nonetheless a power or control over that weapon so that his possession thereof continues despite physical possession being in someone else ... In any disputed question of possession specific facts admitted or proved will alone establish the existence of the facto relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question. In **Pabitar Singh v. State of Bihar**(AIR 1972 SC 1899) the gun was recovered from a room of a quarter which was in joint possession of two persons and one of them was not present at the time of raid and the Apex Court held that the mere presence of the other in that room was not sufficient to make him guilty of the offence unless the Court could come to the conclusion that there was reason to believe that he was aware of the existence of the gun in that room since the prosecution failed to prove that he was in sole occupation of that room at the time of raid and the gun was concealed in such a manner that it was not visible to the naked

eyes, it could not be said that he was aware of the existence of the gun. He was given benefit of doubt. The Court also held that although there may be very grave suspicion that the appellant was aware of the existence of the gun but the prosecution is bound to establish facts from which the Court could have reason to believe that he was aware of the existence of the unlicensed fire arm.

12. In **Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and others**(1979 Cri. L. J. 1390/ AIR 1980 SC 52), the Apex Court, speaking through three learned Judges, stated that "possession is a polymorphous term which may have different meanings in different contexts and it is impossible to work out a completely logical and precise definition of possession uniformly applicable to all situations in the contexts of all statutes. The Supreme Court then referred to **Dias & Hughes** in their book on Jurisprudence and to **Pollock & Wright** as well as the case of **Gunwantlal v. The State of Madhya Pradesh**(supra) and held that the possession of a fire arm must have firstly, the element of consciousness or knowledge of that possession in the person charged with such

offence, and secondly, the person charged has to have either actual physical possession of the fire arm or where he has no such physical possession he has nonetheless a power or control over that weapon. In any disputed question of possession, specific facts admitted, or proved will alone establish the admission of relation of control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question.

13. In **Sanjay Dutt v. State**((1994) 5 SCC 410) the Constitution Bench of the Apex Court has held that in the context of the word "possession", possession means possession with requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession.

14. In **Madan Lal and another v. State of Himachal Pradesh**(2003 CRI. L. J. 3868) the view held in **Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and others**(supra) has been reiterated and followed.

Likewise, the view held in **Gunwantlal v. The State of Madhya Pradesh**(supra) has also been followed and it has further been held that once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge.

15. The learned Public Prosecutor invites my attention to Section 35 of the Arms Act, 1959 and submits that it was for the accused to have proved that he was not in possession of the said articles. Section 35 of the Arms Act, 1959 provides that where any arms or ammunition in respect of which any offence under this Act has been or is being committed are or is found in any premises, vehicle or other place in the joint occupation or under the joint control of several persons, each of such persons in respect of whom there is reason to believe that he was aware of the existence of the arms or ammunition in the premises, vehicle or other place shall, unless the contrary is proved, be liable for that offence in the same manner as if it has been or is being committed by him alone. It is rather too late in the day to press in Section 35 of the Arms Act, 1959 for the accused now stands

acquitted under Sections 3, 5 r/w Section 25 of the Arms Act, 1959.

16. In the case at hand, as the prosecution belatedly realized, the house did not belong to the accused but belonged to his mother in which three more adult persons were residing, namely the accused, his wife and also the sister as reflected on the electoral roll later produced on behalf of the prosecution. The only evidence led by the prosecution to support its case that the accused was in possession of the said arms, ammunitions or explosives is the fact that the accused opened the door of the said room when directed to do so by the raiding party. That the house of the accused was searched, is a story PSI Dessai had to give up when the Mamlatdar informed him that the house stood in the name of the mother of the accused. Prosecution produced no evidence that the room which was searched was in exclusive possession of the accused. The house appears to have been in joint occupation of 4 adult members of the family, including that of the accused. No doubt, the accused is a mechanic and only male member found in the said house and this would raise a strong suspicion against him that he was in possession of the

articles but suspicion however strong cannot take the place of proof beyond reasonable doubt. The house, admittedly, was in joint occupation of the aforesaid persons and in case the prosecution wanted to nail the accused with the exclusive possession of the said articles found in the said room something more was required to be done to prove that the accused was in exclusive and conscious possession of the said articles in the said room. Prosecution has failed to prove beyond reasonable doubt that the said articles found in the said room were in exclusive and conscious possession of the accused and on that count the accused certainly deserves to be given benefit of doubt. The ratio in **Aiyubkhan Pathan**(supra) and **Prabitar Singh**(supra) is applicable to the facts of the case.

17. In view of the above, the accused is entitled to be given benefit of doubt. The appeal succeeds. The impugned Order dated 17-9-2005 is hereby set aside and consequently the accused shall now stand acquitted under Section 9-B(1)(b) of the Explosives Act, 1884. Bail Bond, if any, shall stand cancelled. The learned Additional Sessions Judge is hereby

directed to dispose of the articles seized in accordance with law
at an early date.

N. A. BRITTO, J.

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